Item 49a

COM/SK1/ham **ALTERNATE DRAFT** **Agenda ID # 3437**

Alternate to Agenda ID # 3105
Ratesetting

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER S. KENNEDY**
(Mailed 4/8/2004) (Revised April 20, 2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Metromedia Fiber Network Services, Inc. (U-6030-C) for Modification of its Certificate of Public Convenience and Necessity to Comply with the California Environmental Quality Act.	Application 00-02-039 (Filed February 25, 2000)

OPINION

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OPINION

Summary

In this decision, we impose no penalty on Metromedia Fiber Network Services, Inc. (MFNS) for using the Commission's registration process, rather than the Commission's application process, to obtain Commission approvals before commencing construction on a portion of its California fiber optic network.

The use of the registration process and MFNS's construction activity did violate Commission Rule 17.1 *et seq.*, Decision (D.) 97-06-107, and Instruction 4 to the "registration" form authorized in that decision. However, no penalty is imposed for the violation because MFNS disclosed the scope of its project to the Commission in its registration; because MFNS acted in reliance upon the advice of Commission staff in using the registration process; because the advice of Commission staff in this regard was consistent with Commission practice at the time; and because the Commission itself had no CEQA review process in place for nondominant interexchange carriers (NDIECs) at that time. Furthermore, the Commission approved MFNS's CPCN with no conditions in D.98-07-108. It is important to note that no harm to the environment resulted from the actions of MFNS. We further note that MFNS voluntarily ceased work on its project upon learning that California Environmental Quality Act (CEQA) issues were implicated by the work; that MFNS cooperated fully with the Commission once it became aware that it should have secured a fuller review of its project plans; and that MFNS has no prior record of non-compliance or violation of Commission orders, regulations or requirements. We also note that MFNS already suffered economic harm as a result of its reliance upon the directions of

Commission staff and the subsequent suspension of work on its project. Imposition of a penalty under these circumstances would not serve as a deterrence to future violations of the Commission's regulations, and would in no way serve the public interest. These factors lead us to impose no penalty.

Background

On July 24, 1998, the Commission issued D.98-07-108, granting MFNS a Certificate of Public Convenience and Necessity (CPCN) to provide interLATA and intraLATA telephone service in California.[1] D.98-07-108 imposed a number of standard conditions, none of which restricted in any way the scope of construction authorized or imposed any requirement for additional environmental review prior to commencing construction. Upon the advice of outside counsel and in consultation with Commission staff, MFNS used the Commission's "registration" process to obtain its CPCN.[2] This expedited process allowed NDIECs to file a form "Application for Registration" with the Commission and receive permission to operate in California from the Commission's Executive Director, rather than having to obtain permission from the full Commission.

Attached to the form MFNS filed was a set of Instructions. Instruction 4 stated that:

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[1] California is divided into ten Local Access and Transport Areas (LATAs) of various sizes, each containing numerous local telephone exchanges. "InterLATA" describes services, revenues, and functions that relate to telecommunications originating in one LATA and terminating in another. "IntraLATA" describes services, revenues, and functions that relate to telecommunications originating and terminating within a single LATA.

> Only facilities which meet the requirements for exemption from the California Environmental [Q]uality Act (CEQA) pursuant to Commission Rule of Practice and Procedure Section 17.1(h)(1)(A)(1.) may be included in a CPCN registration. Specifically, minor alterations in an existing structure such as installing a switch in an existing building (sic). *All other facilities will require a formal application.* (Emphasis added.)[3]

Despite this wording, Instruction 4 does not explain what facilities met "the requirements for exemption from the California Environmental Quality Act" and which would require a formal application. In addition, at the time of filing A.98-06-034, neither the Commission nor its staff explained in Instruction 4 what facilities met the requirements for exemption from CEQA.[4]

MFNS filed a registration for an NDIEC CPCN disclosing both the business in which it intended to engage and the construction it sought authority to commence. In Exhibit 5 to its registration, MFNS stated that it "*will construct fiber optic transmission facilities throughout the State of California* in order to provide

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[2] Application (A.) 98-06-034, filed June 17, 1998.

[3] *Affidavit of Dennis E. Codlin,* dated Feb. 20, 2001, Exh. A.

[4] The Commission's recent decision in *Re Pacific Fiber Link* confirms the ambiguity inherent in Instruction 4 when considered in the proper context of Commission policy and practice existing at the time. The Commission found that, "We further find that any violation by PFL of Rule 4 of the registration form and the identical requirement in D.97-06-107 was mitigated by the company's reliance on the existing Commission practice and the unambiguous instructions of Commission staff." D.02-08-063 at 20. Note that Commission staff advised Pacific Fiber Link to use the registration procedure.

dedicated and private line access services" to carriers and corporate and government users "on a point-to-point basis.[5]

Prior to the time CEQA issues were raised, MFNS did not seek or obtain review under CEQA of its plans to build a significant fiber optic network project in the San Francisco Bay Area and the Los Angeles Basin (Project). MFNS stopped work in October 1999, shortly after being contacted by Commission staff and others concerning the Project's compliance with CEQA. MFNS voluntarily stopped construction on October 8, 1999, four days after first being contacted. The Commission subsequently issued a Stop Work Order on October 21, 1999. While the Commission staff allowed MFNS to continue with limited work on the Project, most work was stopped late in 1999.

After issuance of the Stop Work Order, the Commission's staff conducted an environmental review of the Project, and ultimately proposed that the Commission approve a Mitigated Negative Declaration (MND) that would permit MFNS to resume work. Our order in D.00-09-039 approved the MND, lifted the Stop Work Order, and permitted work to resume provided that MFNS observed stringent mitigation measures designed to protect the environment.

We also set a second phase of this proceeding to consider whether we should impose sanctions or penalties on MFNS:

> We recognize that our Stop Work Order has effectively shut this project down for many months, with attendant financial loss to Applicant. We also recognize that applicant has taken steps to

[5] *See* A.98-06-034, Exhibit 5 (emphasis added), a copy of which is attached to the Affidavit of Dennis Codlin as Appendix B.

> mitigate environmental damage. Nevertheless, we believe that further consideration must be given to whether this Commission should levy fines or other sanctions against Applicant and its officers. Our concern is that carriers may not have adequate incentives to comply with the law if the only penalty they face for non-compliance is the possibility of delays in construction. These delays would have occurred in the early stages of the Project anyway if MFNS had complied with the law and submitted to environmental review and mitigation.[6]

The Commission delegated to the assigned administrative law judge (ALJ) authority to issue a ruling commencing the penalty phase. The ALJ did so in two rulings, seeking briefing from MFNS on whether it had violated Commission Rules 1[7] or 17.1 *et seq.*,[8] Pub. Util. Code §§ 701-02 or 2107 *et seq.*, or D.97-06-107 or Instruction 4 of the Application for Registration as an NDIEC that D.97-06-107 authorized.[9]

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[6] D.00-09-039, *mimeo*, p.9

[7] Rule 1 provides that,

> Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of the law.

[8] Because Rule 17.1 is lengthy we do not reproduce it here. The rule is available on the Commission's website at www.cpuc.ca.gov. Rule 17.1 describes the Commission's process for complying with CEQA.

[9] *Administrative Law Judge's Ruling Commencing Phase Two of Proceeding*, dated January 3, 2001, and *Administrative Law Judge's Supplemental Ruling With Regard to Phase Two of Proceeding*, dated April 3, 2001 (collectively, ALJ Rulings).

MFNS filed briefs in response to the ALJ Rulings on February 21, 2001 and May 3, 2001.[10] It asserted that it had violated no law or ruling applicable to MFNS and that sanctions were not warranted. It waived its right to a hearing in three separate submissions.[11] We examine each of its arguments in turn below.

MFNS's Positions

MFNS contends that there was no clear Commission rule, order or decision in 1998 requiring environmental review of NDIEC CPCNs and that the Commission's practice at the time was not to conduct any such review. It cites several 1994-1995 Commission decisions in which the Commission approved CPCNs for NDIECs constructing fiber optic facilities without requiring or conducting any environmental review. MFNS contends Commission staff led its attorneys to believe no such review was required.[12] It also notes that the Commission did not request that MFNS clarify its plans for construction, and indeed decided in D.98-07-108 that MFNS was qualified to use the registration process. Thus, MFNS contends, it had no advance warning that the Commission required environmental review.

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[10] *Brief of Metromedia Fiber Network Services, Inc. in Response to January 3, 2001 ALJ Ruling,* filed Feb. 21, 2001 (MFNS Brief), *Supplemental Brief of Metromedia Fiber Network Services, Inc. in Response to ALJ Ruling of April 3, 2001,* filed May 3, 2001 (MFNS Supplemental Brief).

[11] Letter from Edward W. O'Neill to ALJ Thomas, dated Feb. 9, 2001; *Waiver of Right to Evidentiary Hearing*, filed Feb. 13, 2001; and *Additional Waiver of Right to Evidentiary Hearing,* filed May 3, 2001.

[12] Footnote 46 on page 19 of the Brief of MFNS cites to the transcript in A.99-08-021. In that transcript, the Commission employee overseeing the Commission policy at the time of MFNS's use of the registration process described it as not including CEQA reviews for NDIEC authority. (A.99-08-021, TR 219).

In particular, MFNS states that it knows of no one within the industry or the Commission who interpreted Instruction 4, cited above, as signaling any change in then-existing Commission policy or practice concerning environmental review of telecommunication company requests for CPCNs. MFNS further notes that at the time it submitted its registration for a CPCN, the Commission had never required any applicant solely for NDIEC authority to file a Proponents Environmental Assessment ("PEA") under Commission Rule 17.1 or to undergo any detailed review under the California Environmental Quality Act ("CEQA").[13]

In addition, MFNS states that time, it was well known that the Commission was permitting numerous telecommunications companies, including Pacific Bell, Sprint, AT&E and other competitors of MFNS, to construct facilities similar to those MFNS intended to construct without requiring any additional Commission approval or environmental review. MFNS cites to D.02-08-063, in which the Commission stated, "carriers such as Pacific Bell, Sprint and AT&T were permitted to do similar trenching and conduit projects without CEQA under various claimed exemptions from the Commission process."

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[13] The Commission did not subject any applicant solely for NDIEC authority to environmental review under CEQA until July 6, 1999, approximately 11 months after it granted MFNS its CPCN. Prior to July 6, 1999, the Commission did not have any procedure in place for conducting CEQA review of NDIECs and had never before required such review of NDIEC applications. *See Re Pacific Fiber Link*, D.02-08-063 at 1-2, 10 and Finding 19 at 27 discussing the history regarding the Commission's policy and practice regarding applications for NDIEC authority.

On July 6, 1999, the Commission issued a stop work order to Pacific Fiber Link and required the company to file an application to modify its CPCN together with a PEA under Rule 17.1 prior to proceeding with further facility construction.

The Commission, moreover, imposed no CEQA requirements on MFNS either at the time it filed its registration or one month later in D.98-07-108, which approved the company's CPCN. MFNS notes that its submission in its registration explicitly noted that it "will construct fiber optic transmission facilities throughout the State of California in order to provide dedicated and private line access services." Nevertheless, D.98-07-108 explicitly found that MFNS "was qualified to use the registration process," and that MFNS had "complied with filing requirements for a registration application."[14]

MFNS further notes that at the time MFNS applied for its CPCN, the Commission did not even have a process or procedure for evaluating the environmental impact of NDIEC applications.[15] MFNS notes that the Commission was permitting other telecommunications, including Pacific Bell, Sprint, AT&T, and other competitors of MFNS, to construct facilities similar to those MFNS intended to construct without requiring any additional Commission approval or environmental review under various exemptions from review under CEQA.[16] MFNS argues that given the circumstances at the time MFNS applied for its CPCN, MFNS rightfully believed that the words of the decision, the advice

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[14] D.98-07-108, p. 1.

[15] See *Re Pacific Fiber Link*, D.02-08-063 at 23, in which the Commission stated, "The Commission at all relevant times admittedly had no procedure in place for conducting a CEQA review for PFL." PFL in this context refers to Pacific Fiber Link, an applicant for NDIEC authority like MFNS.

[16] *See Re Pacific Fiber Link*, D.02-08-063 at 22, in which the Commission stated, "Staff was also aware, as was PFL, that carriers such as Pacific Bell, Sprint and AT&T were permitted to do similar trenching and conduit projects without CEQA under various claimed exemptions from the Commission process."

it was given by its outside counsel and by knowledgeable Commission staff responsible for telecommunications licensing were sufficient for the proceeding with the project MFNS had fully disclosed.

MFNS contends that D.02-08-063, concerning the similar actions of Pacific Fiber Link (PFL), confirms the ambiguity inherent in Instruction 4 when considered in the proper context of Commission policy and practice existing at the time. MFNS cites D.02-08-023 as follows: "We further find that any violation by PFL of Rule 4 of the registration form and the identical requirement in D.97-06-107 was mitigated by the company's reliance on the existing Commission practice and the unambiguous instructions of Commission staff."

MFNS claims alternatively that its project was exempt from CEQA either because there was no possibility that the activity in question might have a significant adverse effect on the environment, or because a specific exemption from CEQA[17] obviated the need for CEQA review. MFNS thus contends it should not be penalized.

MFNS also contends that even if the Commission were to find that MFNS committed a violation of a Commission rule, order or decision, it would be inequitable to impose a penalty since MFNS did not intentionally violate the law.

Discussion

We find that MFNS violated Commission Rule 17.1, D.97-06-107, and Instruction 4 to the Commission's NDIEC registration form. This violation,

[17] *See* 14 Cal. Code of Regs. §§ 15260-15285.

however, is mitigated by the circumstances that existed at that time of MFNS registration and installation activities.

1. Violation of Commission Rule 17.1, D.97-06-107 and Instruction 4

A. MFNS Did Not Qualify for the Registration Process

Attached to the declaration of MFNS's Vice President, Legal Affairs and Assistant Secretary Dennis Codlin is the registration form MFNS submitted. It was this form that led the Commission to grant MFNS its CPCN in D.98-07-018, and on which MFNS in turn based its decision to commence construction. Attached to the registration form MFNS filed with the Commission was a set of instructions containing, in pertinent part, Instruction 4:

> Only facilities which meet the requirements for exemption from the CEQA pursuant to Commission Rule of Practice and Procedure 17.1 (h)(1)(A)(1) may be included in a CPCN registration. *Specifically, minor alterations in an existing structure such as installing a switch in an existing building (sic). All other facilities will require a formal application.* (Emphasis added.)

Despite the ambiguities noted above and the conditions discussed in D.02-08-063, the language states that only minor alterations in an existing structure were allowed as part of the registration process. MFNS nowhere claims that its comprehensive Project – which included new trenching – fits the "minor alterations" definition.

There is no evidence that anyone, at the time the application was filed, interpreted this registration process as a change in the existing practice of not requiring an applicant for only NDIEC authority to file a Proponents' Environmental Assessment, despite the clear disclosure of construction plans.

Indeed, Commission staff, consistent with the then current practice, explicitly told an MFNS attorney that MFNS was eligible to use the registration process. Indeed, in a related proceeding (A.99-08-021), the same Commission employee stated that during this period he believed that the Commission did not require CEQA reviews for NDIECs.[18] Finally, we note that notwithstanding Instruction 4, the Commission explicitly found that MFNS "*was qualified to use the registration process*" and "*complied with filing requirements for a registration application*."[19]

B. MFNS's Project Was Not a Minor Alteration of Existing Facilities Exempt From CEQA Review

MFNS's project, however, was not exempt from CEQA review. As of 1998, we had already issued several decisions interpreting the "minor alterations" language contained in Instruction 4, which derives from 15301 of the Guidelines for the Implementation of the California Environmental Quality Act, Cal. Code Regs, tit. 14, §§ 15000 *et seQ*. These guidelines, while lengthy, do not permit trenching of the sort conducted during the Project. The restrictive nature of the phrase "minor alteration" precludes the Project from falling within the purview of this exemption.

[18] Application of Pacific Fiber Link, A.99-08-021, Hearing Tr. At 279-291.

[19] D.98-07-108 at 1 (emphasis added).

1. Cases MFNS Cites Indicate Changing Commission Positions on the Need for a CEQA Review

MFNS cites several cases that it claims grant NDIECs a broad authority to build fiber optic networks. Those cases were decided in 1994 and 1995.[20]

Subsequently, in 1997, D.97-06-107 stated that, "The [registration] instructions have been modified to clarify that facilities-based carriers which require CEQA review for the facilities may not use this process." In addition, the Commission subsequently adopted Instruction 4, which contains the "minor alteration" language. Thus, the standard for Commission review was changing during this period. Moreover, even though the Commission policy was changing, the Commission did not actually break with its prior NDIEC precedent and interpret Rule 17.1 , D.97-06107 and Instruction 4 as requiring facilities-based NDIEC to undergo review under CEQA until July 1999, long after MFNS filed its registration.

2. Instruction 4 and Commission Actions at the Time Created Significant Confusion and Ambiguity Concerning Requirements

Instruction 4 states that except for "minor alterations in an existing structure such as installing a switch in an existing building (sic) " that "All other facilities will require a formal application." Although the language of Instruction 4 should have put MFNS on notice that the facilities that it intended to construct required analysis under CEQA and Commission Rule 17.1,

[20] MFNS cites D.95-04-058, D.95-05-004, D.94-03-073, D.94-05-045, D.94-02-046 and D.94-04-001. MFNS Brief at 18 n.41.

as we explained in D.02-08-063 (based on similar circumstances facing another company installing fiber optic cable), Instruction 4 and the Commission's actions during that time created ambiguity concerning registration requirements, and significant confusion among Commission staff and others concerning those requirements. In this environment, we believe MFNS did what any responsible actor would have done – it relied upon the advice of outside counsel and Commission staff in attempting to adhere to Commission requirements.

C. MFNS Technically Violated Rule 17.1, D.97-06-107 and Instruction 4

Because of the scope of its project, MFNS should have filed an application that would have triggered a CEQA analysis of the project before MFNS commenced this project. MFNS therefore violated Rule 17.1, D.97-06-107 and Instruction 4.

2. Penalties

Under Pub. Util. Code § 2107, any utility that violates any order of the decision is "subject to a penalty" and the statutory range of Commission penalties is from $500 to $20,000 for each offense.[21] Each day of violation is considered a separate violation.[22] The Commission, however, has broad discretion in administering this section of the code, and even while we hold utilities "subject" to a penalty, we may elect to suspend the whole or portion of a penalty, or decline to impose a penalty altogether.

[21] Pub. Util. Code § 2107.

[22] Pub. Util. Code § 2108.

We have set forth criteria for considering penalties in D.98-12-075, and we find those criteria illustrative here. Those criteria, and our assessment of MFNS's conduct in light of them, follow.

A. No Harm to the Environment

According to D.98-12-075, the most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following. MFNS's actions in engaging in construction without CEQA review threatened, but did not actually cause, environmental harm.

MFNS asserts that this fact ends the inquiry. While there is no evidence of any actual harm to the environment, this criterion nonetheless recognizes the need for penalties even where actions threaten, but do not cause, harm.

On the other hand, as soon as MFNS became aware of the need for CEQA compliance, it immediately retained environmental monitors or other experts on the job-site who could have prevented such harm were it imminent. In addition, MFNS stopped work as soon as it became aware of concerns raised by the Native American Heritage Commission, the Commission staff, and the Attorney General's office.

Given that there is no evidence of harm to the environment and given the speedy action by MFNS to comply with Commission rules, we find that this factor would mitigate the need for a penalty.

B. Economic Harm to MFNS

According to D.98-12-075, the severity of a violation increases with (1) the level of costs imposed upon the victims of the violation, and (2) the unlawful benefits gained by the applicant. Generally, the greater of these two amounts

will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

There is no evidence of any costs imposed on victims of the violation. Indeed, the delay in construction caused by MFNS failure to conduct a CEQA analysis increased only its own costs. On balance, this factor suggests that there is no need for an additional penalty.

C. No Harm to the Regulatory Process

A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.

MFNS's witness, Mr. Codlin, pointed out that the company's attorney received clear information from a Commission staff person that MFNS could use the registration process:

> I am informed that in May-June 1998, Swidler associate Kevin Minsky had telephone conversations with a member of the Commission's Telecommunications Division, Joe McIlvain, concerning the Commission's licensing requirements and procedures for obtaining a certificate of public convenience and necessity ("CPCN") for the type of services MFNS intended to offer and for the construction that MFNS planned to undertake.

Mr. Codlin then stated that MFNS's lawyer advised him of three things: (1) that MFNS need not file an application for facilities-based local exchange service, (2) that MFNS could proceed with the registration process, and (3) that MFNS should indicate in its registration form what construction it intended to

undertake. Mr. Codlin concluded that, "I am informed that [the Commission's] Mr. McIlvain concurred with this advice."[23]

Thus, while MFNS violated a Commission rule, there is evidence that it did so in reliance upon the directions of Commission staff and that those directions were clear, unambiguous, and consistent with Commission practice.

On balance, we find that the Commission should stand behind the advice given by its employees, and this factor warrants the elimination of penalties. Indeed, we note that the Commission employee responsible for administering the Commission's policy stated:

> I would recommend the general policy – I hope this answers your question – that the general policy of this Commission should be the following: We and utilities have been screwing up for years. We're going to change our policy as of today and tell all the utilities that from now on this is what they must do and what we will do, concerning our responsibilities in CEQA as well as the utilities' responsibilities in CEQA.
>
> Prior to that statement, I think the Commission should not go back retroactively and say, "Well, you should have known we didn't mean what we did, but you did mean what you did." (A.99-08-021, TR at 285-5, referenced in Brief of MFNS, p. 19, fn. 46.)

The position of our employee strikes us as reasonable.

D. The Number and Scope of the Violations

Under D.98-12-075, a single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.

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[23] *Affidavit of Dennis E. Codlin,* dated Feb. 20, 2001, ¶ 8.

In D.02-08-063, a case similar to this one, we imposed a penalty for each day during which unauthorized construction took place. MFNS's construction lasted approximately from September 1998 until October 8, 1999,[24] compared to approximately 200 days in the case resolved by D.02-08-063 concerning Pacific Fiber Link. However, MFNS continued construction for only 4 days after first being informed that it may not have been in compliance with CEQA, and MFNS voluntarily suspended construction 13 days *before* the Commission issued a stop work order. In contrast, Pacific Fiber Link continued construction for 216 days *after* it knew that serious questions had been raised concerning its CEQA compliance, and Pacific Fiber Link did not stop such construction until the Commission issued a stop work order to do so. Thus, although the violation of MFNS was technically ongoing, MFNS's actions subsequent to CEQA issues being brought to its attention substantially differentiate this case from the situation in Pacific Fiber Link, and would warrant a substantial reduction in any penalty we might choose to impose on MFNS.

E. No Prior Record of Non-Compliance

The next D.98-12-075 criterion provides that applicants are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The applicant's past record of compliance may be considered in assessing any penalty.

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[24] *Affidavit of Charles William Cook, Jr.*, filed Feb. 20, 2001, ¶ 5 & Exh. A. This end date predates Commission issuance of its Stop Work Order on October 18, 1999 because MFNS received calls from the Commission's staff, the California Attorney General's office and the Native American Heritage Commission questioning MFNS's activities between October 4 and October 8, 1999.

MFNS has no prior record of noncompliance before this Commission. We find this criterion warrants a decrease in the amount of the penalty.

F. No Deliberate Wrongdoing

According to D.98-12-075, applicants are expected diligently to monitor their activities. Deliberate, as opposed to inadvertent, wrongdoing will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty. In this case, MFNS proceeded without CEQA authorization, but the evidence does not show that it acted with the intent to violate the law. We do not find that this factor warrants an increase or decrease in the penalty.

G. Prompt Action to Disclose and Rectify a Violation

Applicants are expected promptly to bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by an applicant promptly and cooperatively to report and correct violations may be considered in assessing any penalty.

As discussed above, MFNS voluntarily stopped work when first contacted about possible CEQA violations, and subsequently cooperated with all parties in resolving the CEQA issues. In addition, MFNS disclosed in Exhibit 5 of its registration form that it would "construct fiber optic transmission facilities throughout the State of California." So it is clear that at no point MFNS did attempt to conceal its plans in Exhibit 5 or the nature of the work done as part of the Project.

H. A Penalty Would Produce No Deterrence

Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the applicant in setting a fine. We may take official notice of the fact that MFNS has recently emerged from Chapter 11 bankruptcy proceedings. We do not have financial information from MFNS generated since it emerged from those proceedings.

In addition, since MFNS sought to comply with the directions of Commission staff, a fine would have no reasonable deterrent effect. Indeed, we desire that companies comply with Commission direction.

I. Constitutional Limitations on Excessive Fines

Under D.98-12-075, the Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each Applicant's financial resources. We have set the penalty with this principle in mind.

J. The Degree of Wrongdoing

In setting penalties, the Commission reviews facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing. We have discussed these facts above and find that no penalty is warranted. In this case, the facts that mitigate and exacerbate the wrongdoing are the following:

Mitigating Facts:

- MFNS's disclosure in Exhibit 5 of the registration form of the scope of its activities;
- The Commission approved the registration in D.98-07-018, which did not require a CEQA review;
- Lack of actual environmental harm;

- Economic harm to MFNS;
- No party sought or requested that MFNS be sanctioned for its conduct in implementing the registration authority;
- Upon being advised that there were CEQA issues, MFNS ceased construction within 4 days and did so voluntarily – before the Commission issues a Stop Work Order;
- The Commission advised MFNS that no CEQA review was required;
- MFNS's prior clean record;
- Lack of intentional misconduct; and
- A penalty would produce no deterrence.

Exacerbating Facts:

- None.

K. The Public Interest

Under D.98-12-075, in all cases, the harm will be evaluated from the perspective of the public interest. In our view, it is in the public interest for applicants to comply with the Commission's directions and interpretations of its rules. Since MFNS followed Commission directions, penalizing it will have no deterrent effect.

L. The Role of Precedent

The Commission will consider (1) previous decisions that involve reasonably comparable factual circumstances, and (2) any substantial differences in outcome. We have fined two companies in somewhat similar circumstances as discussed herein. However, since this Project produced no environmental harm and proceeded with Commission approval, it is appropriate that we impose no fine in this case.

M. No Penalty Warranted

As noted previously, under Pub. Util. Code § 2107, each violation subjects a utility to a potential fine in the range of $500-$20,000 per violation. In the case of a "continuing violation," each day of violation is a separate offense.[25] MFNS's construction lasted from September 1998 until October 8, 1999, approximately 400 days. If we decided to impose maximum penalties for each day of construction, the penalty would be $8 million. At $500 per day, the penalty would be $200,000. We note that in two Commission decisions imposing penalties for unauthorized fiber optic construction, we imposed penalties of $25,000[26] and $105,000.[27]

MFNS's conduct is much less serious than that of the other applicants. It is less egregious than that that identified in D.02-08-063, which imposed the lower penalty. Due to a large number of factors that contravene the imposition of a penalty, it is in our discretion to decline to impose a penalty. In particular, we note that:

- MFNS disclosed the scope of its project to the Commission in its registration;
- MFNS acted in reliance upon the advice of Commission staff in using the registration process and the advice of Commission staff in this regard was consistent with Commission practice at the time;

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[25] Pub. Util. Code § 2108.

[26] D.02-08-063 (Pacific Fiber Link), as corrected in D.02-10-021.

[27] D.01-10-001 (Pacific Pipeline System LLC).

- the Commission itself had no CEQA review process in place for NDIECs at that time;
- the Commission approved MFNS's CPCN with no conditions in D.98-07-108; and
- no harm to the environment resulted from the actions of MFNS.

We further note that MFNS voluntarily ceased work on its Project upon learning that CEQA issues were implicated by the work; that MFNS cooperated fully with the Commission once it became aware that it should have secured a fuller review of its project plans; and that MFNS has no prior record of non-compliance or violation of Commission orders, regulations or requirements.

We also note that MFNS already suffered economic harm as a result of its reliance upon the directions of Commission staff and the subsequent suspension of work on its project. Imposition of a penalty under these circumstances would not serve as a deterrence to future violations of the Commission's regulations, and would in no way serve the public interest.

We therefore find that the fairest outcome is to impose no penalty.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on April 15, 2004. There were no reply comments.

The comments of MFNS provided additional citations to the factual record and additional legal precedent for exercising forbearance in the imposition of a penalty. MFNS cites D.95-04-075, in which Southwest Gas filed an application for an expansion of its natural gas distribution system without a PEA. The Commission responded by informing Southwest that its application for a CPCN was simply incomplete, and undertook no enforcement action. In D.03-12-064, the Commission found that Altrio Communications violated the terms of its limited facilities-based CPCN, but imposed no fine.

Finally, MFNS renewed its argument that because of the Commission's actions in interpreting Instruction 4, that there are good grounds for finding no violation of any Commission decision, rule or regulation. We find this argument unpersuasive. As noted above, the language was clear and, given the totality of the circumstances, including the actions of this Commission, the most reasonable course is to find that MFNS did violate the rule, but impose no fine.

In addition to the comments discussed specifically, we have reviewed all the comments and made changes as we deemed appropriate.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Sarah R. Thomas is the assigned ALJ in this proceeding.

Findings of Fact

1. On July 24, 1998, the Commission issued D.98-07-108, granting MFNS a CPCN to provide interLATA and intraLATA telephone service in California.

2. D.98-07-108 imposed a number of standard conditions, none of which restricted in any way the scope of construction authorized or imposed any

requirement for additional environmental review prior to commencing construction.

3. Upon the advice of experienced outside counsel and conversations with key Commission staff, MFNS used the Commission's "registration" process to obtain its CPCN.

4. Attached to the registration form MFNS filed was a set of Instructions. Instruction 4 stated that:

> Only facilities which *meet the requirements for exemption* from the California Environmental [Q]uality Act (CEQA) pursuant to Commission Rule of Practice and Procedure 17.1(h)(1)(A)(1.) may be included in a CPCN registration. Specifically, minor alterations in an existing structure such as installing a switch in an existing building (sic). All other facilities will require a formal application. (Emphasis added.)

5. While MFNS was aware of Instruction 4 to its registration form, at the time of filing A.98-06-034, neither the Commission nor its staff explained in Instruction 4 what facilities met "the requirements for exemption [CEQA]."

6. At the time MFNS filed its registration, it was well known that the Commission was permitting numerous telecommunications companies to construct facilities similar to those MFNS intended to construct without any prior environmental review.

7. The Commission did not interpret Rule 17.1, D.97-06-107, or Instruction 4 to require any applicant solely for NDIEC authority to undergo environmental review under CEQA or to file an application in lieu of a registration until July 1999, eleven months after MFNS filed its registration.

8. Exhibit 5 to MFNS's registration application was a "Description of Services," noting that, "MFNS will construct fiber optic transmission facilities throughout the State of California."

9. Prior to the time that CEQA issues were raised, MFNS did not seek or obtain review under CEQA of its plans to build a significant fiber optic network project in the San Francisco Bay Area and the Los Angeles Basin.

10. In reliance upon the Commission's explicit finding that MFNS "was qualified to use the registration process" and that it "complied with filing requirements for" registration, MFNS commenced its work with no analysis of the impact on the environment.

11. MFNS stopped work after being contacted by Commission staff and others in early October 1999 and informed that CEQA review would be required before the Project could continue. MFNS voluntarily stopped construction on October 8, 1999. The Commission issued a Stop Work Order on October 21, 1999. While the Commission staff allowed MFNS to continue with limited work on the Project, most work was stopped prior to the Stop Work Order.

12. MFNS's Project was not a minor alteration to an existing facility.

13. Commission staff gave an MFNS attorney clear direction that MFNS was eligible to use the registration process.

14. It was reasonable for MFNS to follow the directions of a Commission employee, who told companies applying for a NDIEC at that time that no CEQA review was necessary, and to rely upon the Commission's decision granting MFNS a CPCN and finding that it qualified for the registration process.

15. As soon as MFNS became aware of the need for CEQA compliance it immediately retained environmental monitors or other experts on the job-site who could have prevent harm were it imminent.

16. There is no evidence of any actual harm to the environment as a result of MFNS's actions here.

17. MFNS proceeded without CEQA authorization, but there is no evidence that it intentionally violated the any regulation or law.

18. MFNS stopped work as soon as it became aware of concerns raised by the Native American Heritage Commission, the Commission staff and the Attorney General's office.

19. We may take official notice of the fact that MFNS has recently emerged from Chapter 11 bankruptcy.

20. When it first learned of any CEQA compliance issue on October 4, 1999, MFNS's construction lasted approximately 4 days, until October 8, 1999, and was voluntarily suspended well before the Stop Work Order on October 21, 1999.

21. In two Commission decisions imposing penalties for unauthorized fiber optic construction, we imposed penalties of $25,000 and $105,000.

22. In this case the following are mitigating and exacerbating factors:

Mitigating Facts:

- At the time of MFNS's application, it was well knows that the Commission was permitting other telecommunications carriers to construct facilities without environmental review;
- MFNS sought advice from Commission staff regarding applicable procedures and requirements and followed that advice;
- Commission staff advised MFNS to use the registration process and its advice was consistent with the Commission's then existing policy and practice;
- MFNS's disclosure in Exhibit 5 of the registration form of the scope of its activities;
- The Commission approved the registration in D.98-07-018, which did not require a CEQA review;

- In its decision granting MFNS's CPCN, the Commission found that the company was qualified to use the registration process and had complied with filing requirements;
- Lack of actual environmental harm;
- Economic harm to MFNS;
- No party sought or requested that MFNS be sanctioned for its conduct in implementing the registration authority;
- Upon being advised that there were CEQA issues, MFNS ceased construction within 4 days and did so voluntarily – before the Commission issued a Stop Work Order;
- The Commission advised MFNS that no CEQA review was required;
- MFNS cooperated fully with the Commission to bring its activities into full compliance with the Commission's new requirements;
- MFNS's prior clean record;
- Lack of intentional misconduct; and
- A penalty would produce no deterrence.

Exacerbating Facts:

- None.

Conclusions of Law

1. MFNS's actions of commencing construction after it received authority from the Commission in D.98-07-108 finding that it "was qualified to use the registration process" and "complied with the filing requirements for a registration application," constitute a technical violation of Commission Rule 17.1, D.97-06-107, and Instruction 4 to the Commission's NDIEC Registration form.

2. Such a violation is totally mitigated by MFNS's immediate and voluntary response to stop construction upon being advised that CEQA compliance was being questioned, by the fact that it acted pursuant to the directions of the Commission, and by the fact that no environmental harm occurred.

3. The public interest does not justify the imposition of any fines or sanctions under these circumstances.

4. Under Pub. Util. Code § 2107, any public utility that neglects to comply with any order, decision or rule of the Commission is subject to a penalty of no less than $500 and no more than $20,000 for each offense.

5. Under Pub. Util. Code § 2108, each day of violation is considered a separate violation.

6. According to D.98-12-075, the most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following. MFNS's actions did not actually cause environmental harm.

7. We can impose penalties where a party threatens but does actually cause environmental harm.

8. MFNS committed a violation for each day of construction pursuant to Pub. Util. Code §§ 2107 and 2108.

9.There should be no penalty in view of the mitigating facts and circumstances present here.

10. A penalty of zero is consistent with our penalty in D.02-08-063.

11. It is not in the public interest for us to penalize MFNS since they complied with Commission directions.

O R D E R

IT IS ORDERED that:

1. Metromedia Fiber Network Services, Inc. (MFNS) violated Commission Rule 17.1, Decision (D.) 97-06-107, and Instruction 4 to the Commission's non-dominant interexchange carrier registration form.

2. MFNS shall be assessed no penalty due to the mitigating facts in the record.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the attached Alternate Draft Decision of Commissioner Kennedy A.00-02-039 regarding Metromedia Fiber Network Services, Inc. (U-6030-C) for Modification of its Certificate of Public Convenience and Necessity to Comply with the California Environmental Quality Act to all parties of record in this proceeding or their attorneys of record.

Dated April 8, 2004, at San Francisco, California.

Halina Marcinkowski

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* *

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